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No. 86-857

Supreme Court, U.S.
FILED

DEC 29 1986

JOSEPH F. SPANIOL, JR.
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In The
Supreme Court of the United States
October Term, 1986

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BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

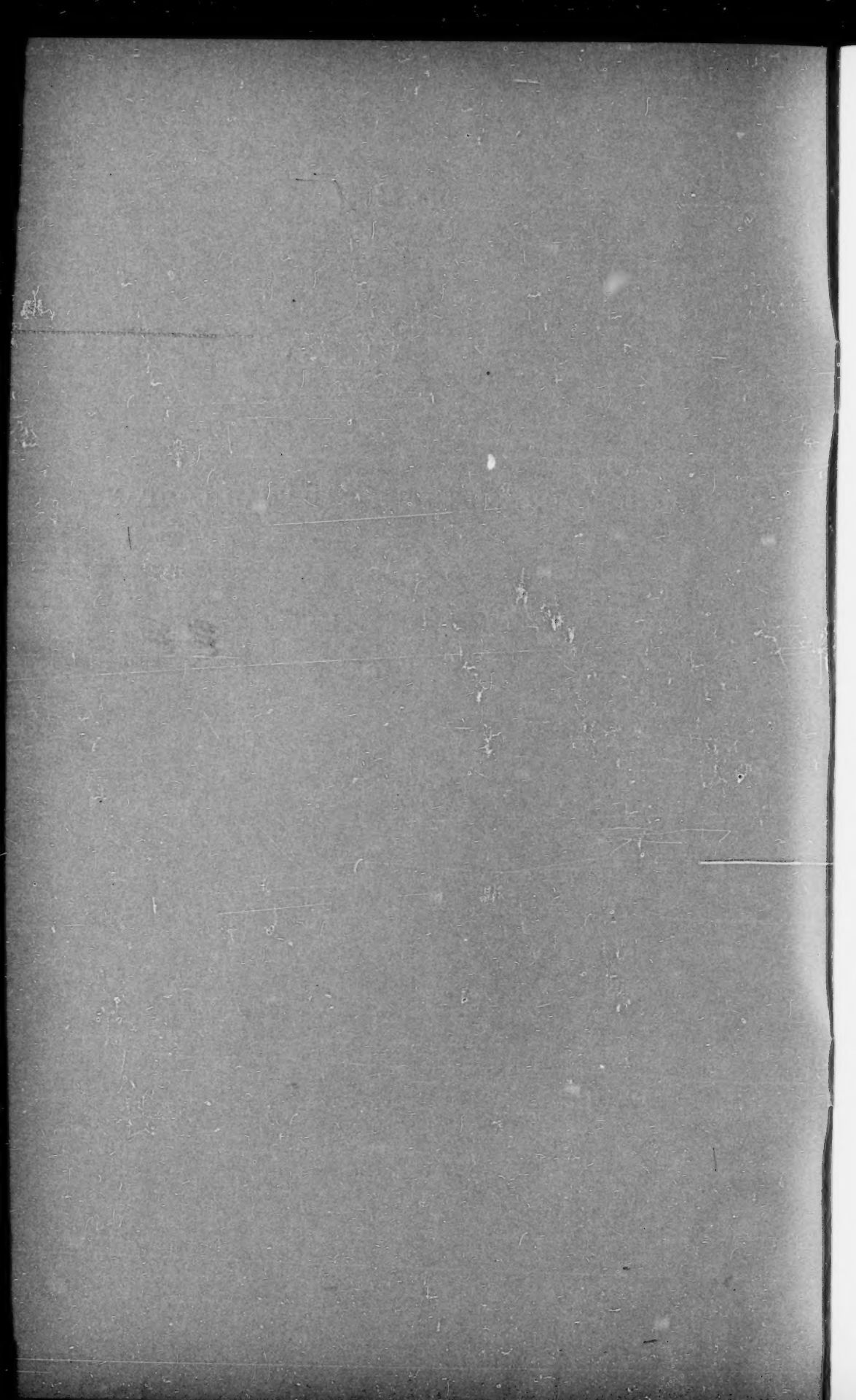
ROMESH GULATI,
Respondent.

— o —
**BRIEF IN OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI TO THE
SUPREME COURT OF MINNESOTA**

— o —
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QUESTIONS PRESENTED

1. Whether the Minnesota Supreme Court properly held that respondent's state law claim for intentional infliction of emotional distress, based upon repeated outrageous acts by the railroad, was not preempted by the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.*
2. Whether the Minnesota Supreme Court properly held that respondent's state law claim, based upon outrageous acts intended to cause him emotional distress, was not preempted by the Federal Employers' Liability Act, 45 U.S.C. §§ 51, *et seq.*

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT	2
REASONS FOR DENYING THE WRIT	3
A. <i>Minnesota's Cause of Action for Intentional Infliction of Emotional Distress</i>	5
B. <i>The Railway Labor Act</i>	7
C. <i>The Federal Employers' Liability Act</i>	16
D. <i>Effect of This Court's Consideration of The Atchison, T. and S.F. Ry. v. Buell, No. 85-1140</i>	18
CONCLUSION	19

TABLE OF AUTHORITIES

CASES	Page
<i>Allis-Chalmers Corp. v. Lueck</i> , — U.S. —, 105 S.Ct. 1904 (1985)	15
<i>Andrews v. Louisville & Nashville R.R. Co.</i> , 406 U.S. 320 (1972)	10
<i>Balzeit v. Southern Pacific Transportation Co.</i> , 569 F.Supp. 986 (N.D. Cal. 1983)	3, 14
<i>Beers v. Southern Pacific Transportation Co.</i> , 703 F.2d 425 (9th Cir. 1983)	9
<i>Brotherhood of Locomotive Engineers v. Baltimore & Ohio R.R. Co.</i> , 372 U.S. 284 (1963)	10
<i>Brotherhood of Railroad Trainmen v. Chicago River and Indiana R.R. Co.</i> , 353 U.S. 30 (1957)	8
<i>Buell v. Atchison, T. S.F. Ry.</i> , 771 F.2d 1320 (9th Cir. 1985), cert. granted, 106 S.Ct. 1946 (1986)	18, 19
<i>Bullard v. Central Vermont Railway, Inc.</i> , 565 F.2d 193 (1st Cir. 1977)	17
<i>Cales v. Chesapeake & Ohio Railway Co.</i> , 300 F. Supp. 155 (W.D. Va. 1969)	17
<i>Chicago and Northwestern Transportation Co. v. Kalo Brick and Tile Co.</i> , 450 U.S. 311 (1981)	4
<i>Choate v. Louisville & Nashville R.R. Co.</i> , 715 F.2d 369 (7th Cir. 1983)	8
<i>Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25</i> , 430 U.S. 290 (1977)	8, 11, 12, 13, 14, 15, 17
<i>Fidelity Federal Savings & Loan Association v. De la Cuesta</i> , 458 U.S. 141 (1982)	4
<i>Florida Line & Avocado Growers v. Paul</i> , 373 U.S. 132 (1963)	5
<i>Haagenson v. National Farmers Union Property and Casualty Co.</i> , 277 N.W.2d 648 (Minn. 1979)	6

TABLE OF AUTHORITIES—Continued

	Page
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941)	5
<i>Hubbard v. United Press International, Inc.</i> , 330 N.W.2d 428 (Minn. 1983)	6, 9
<i>Jackson v. Consolidated Rail Corp.</i> , 717 F.2d 1045 (7th Cir. 1983), <i>cert. denied</i> , 465 U.S. 1007 (1984)	8, 15
<i>Janelle v. Seaboard Coastline R.R.</i> , 524 F.2d 1259 (5th Cir. 1975)	16
<i>Johnson v. Sampson</i> , 167 Minn. 203, 208 N.W. 814 (1926)	5
<i>Jones v. Rath Packing Co.</i> , 430 U.S. 519 (1977)	4
<i>Lancaster v. Norfolk and Western Railway Co.</i> , 773 F.2d 807 (7th Cir. 1985)	17
<i>Lewis v. Louisville & Nashville R.R. Co.</i> , 758 F.2d 219 (7th Cir. 1985)	3, 17
<i>Magnuson v. Burlington Northern, Inc.</i> , 576 F.2d 1367 (9th Cir. 1978), <i>cert. denied</i> , 439 U.S. 930 (1978)	8
<i>McSorley v. Consolidated Rail Corp.</i> , 581 F.Supp. 642 (S.D.N.Y. 1984)	17
<i>New York Central and Hudson R.R. v. Tonsellito</i> , 244 U.S. 360 (1917)	16
<i>State Farm Mutual Automobile Insurance Com- pany v. Village of Isle</i> , 265 Minn. 360, 122 N.W. 2d 36 (1963)	6
<i>Tello v. Soo Line R.R. Co.</i> , 772 F.2d 458 (8th Cir. 1985)	3, 17
<i>Terminal Railroad Assoc. of St. Louis v. Brother- hood of Railroad Trainmen</i> , 318 U.S. 1 (1943)	8, 10

TABLE OF AUTHORITIES—Continued

	Page
STATUTES	
Federal Employers' Liability Act, 45 U.S.C. §§ 51, <i>et seq.</i>	16
National Labor Relations Act, 29 U.S.C. §§ 151, <i>et seq.</i>	8
Railway Labor Act, 45 U.S.C. § 151, <i>et seq.</i>	2
Taft-Hartley Act, 29 U.S.C. § 185	15
OTHER AUTHORITIES	
Annot., 8 A.L.R.3d 442 (1966 & Supp. 1985)	17
Note, <i>Torts-Intentional Infliction of Mental Suffering—A New Tort</i> , 22 Minn. L.Rev. 1030 (1938)	5
<i>Restatement (Second) of Torts</i> § 46(1) (1965)	6



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Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR A
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SUPREME COURT OF MINNESOTA**

Respondent Romesh Gulati respectfully submits this brief in opposition to petitioner Burlington Northern Railroad Company's Petition for a Writ of Certiorari to review the decision of the Minnesota Supreme Court.

STATEMENT

With one important exception, respondent Romesh Gulati does not take issue with petitioner Burlington Northern's Statement of the Case. The Burlington Northern correctly notes respondent's allegations that it subjected him to constant and conspicuous surveillance and harassment, trumped-up disciplinary charges, breaking into his work locker, racial slurs and threats to "get him," and other repeated instances of outrageous behavior (allegations which must be taken as true for the purpose of this Petition), but the Burlington Northern then incorrectly states that respondent filed his state lawsuit "[r]ather than seek[ing] relief for this alleged misconduct through the administrative machinery created by . . . the RLA." (Petition, p. 5) (emphasis added)

The problem with the Burlington Northern's characterization of respondent's actions is that the Railway Labor Act ("RLA") 45 U.S.C. §§ 151, *et seq.* does *not* provide *any remedy* for the harm suffered from this misconduct, i.e. plaintiff's emotional distress. There is no provision in the RLA, nor in the collective bargaining agreement between the Burlington Northern and respondent, that permits respondent to make a claim for his emotional distress resulting from the repeated outrageous acts outlined above. The only relief this administrative process would be capable of providing to respondent is the return of his job, and respondent is in no way, shape or form seeking return of his job, or, for that matter, any other type of relief available under the administrative procedures of the RLA or his collective bargaining agreement. The harm suffered by respondent from these repeated intentional acts was *not*

the loss of his job, but severe emotional distress, and his *sole* claim before the Minnesota Supreme Court was, and remains, one for the emotional distress intentionally and knowingly inflicted upon him by the Burlington Northern.

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REASONS FOR DENYING THE WRIT

Contrary to the Burlington Northern's claim, the Minnesota Supreme Court's decision is in complete harmony with the decisions of this Court, as well as with the various federal courts¹ and state courts² that have ruled on these issues. The Minnesota Supreme Court's decision does not, as the Burlington Northern would have this Court believe, permit railroad employees to evade the RLA for claims that are properly within the RLA's scope. By providing a remedy *not available* under the RLA to the few railroad employees who can meet the extremely high threshold of a Minnesota claim for intentional infliction of emotional distress, the Minnesota Supreme Court prevented railroads from taking unfair advantage of a *gap* in federal railroad laws, within which they could otherwise intentionally cause emotional harm to their employees without fear of liability. There is thus no need for this Court to review a state law

¹ See, *Lewis v. Louisville & Nashville R.R. Co.*, 758 F.2d 219 (7th Cir. 1985); *Tello v. Soo Line R.R. Co.*, 772 F.2d 458 (8th Cir. 1985); and *Balzeit v. Southern Pacific Transportation Co.*, 569 F.Supp. 986 (N.D. Cal. 1983).

² See, *DeTomaso v. Pan American World Airways, Inc.*, 174 Cal.App.3d 1170 (Cal. App. 1985), *appeal pending*, 714 P. 2d 1239 (1986); *Hanson v. City of Tacoma*, 719 P.2d 104 (Wash. 1986).

decision that is *fully consistent* with federal railroad laws, and which in fact *aids* the administration of these laws by eliminating as a source of conflict between railroads and their employees an entire area where railroads could otherwise wrongfully act against their employees *with impunity*.

The alleged conflict with federal railroad laws of which the Burlington Northern strenuously complains is, in reality, a false conflict. A close examination of the Minnesota Supreme Court's reasoned and well researched opinion reveals that the Minnesota Supreme Court considered each and every argument petitioner makes here, and rejected these arguments on the basis of this Court's decisions. As the following analysis will show, there is thus no need for this Court to reconsider what the Minnesota Supreme Court has already stated so well.

The broad issues here are, of course, based upon the preemption doctrine. The Minnesota Supreme Court first correctly noted that the preemption of state law by federal statutes or regulations is "not favored" (App., 8a)³, (quoting *Chicago and Northwestern Transportation Co. v. Kalo Brick and Tile Co.*, 450 U.S. 311, 317 (1981)), and then discussed the three types of cases in which preemption applies. To summarize the Minnesota Supreme Court's analysis, preemption may be explicit,⁴ implicit in the federal scheme,⁵ or may arise where the state law conflicts with or is an obstacle to the accomplishment of the pur-

³ App. refers to Petitioner's Appendix.

⁴ Citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

⁵ Citing *Fidelity Federal Savings & Loan Association v. De la Cuesta*, 458 U.S. 141, 153 (1982); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

poses of the federal scheme.⁶ (App., 9a) The focus is immediately narrowed here because neither the RLA or the FELA explicitly preempts respondent's state law claim. The focus must then turn to the questions of, first, implicit preemption and second, whether the state law conflicts with or is an obstacle to the federal scheme. This analysis must begin with an examination of the state law claim in question.

A. Minnesota's Cause of Action for Intentional Infliction of Emotional Distress.

The State of Minnesota has long considered the protection of its citizens from emotional abuse and harm to be a strong state interest, the Minnesota Supreme Court stating here that:

Minnesota has a strong interest in protecting its citizens from outrageous emotional abuse because the emotional health and well-being of its citizens is vital, not only to a stable economy, but to a civilized culture. (App., 19a)

Minnesota has long permitted recovery for emotional distress, holding that a schoolgirl could recover damages for mental suffering resulting from false accusations of unchastity and threats of imprisonment. *Johnson v. Sampson*, 167 Minn. 203, 208 N.W. 814 (1926). Indeed, an early commentator noted that Minnesota "has taken the lead in this field." Note, *Torts-Intentional Infliction of Mental Suffering—A New Tort*, 22 Minn. L. Rev. 1030, 1038 (1938). In 1963, Minnesota law had evolved to the point that damages for mental anguish or suffering were re-

⁶ Citing *Florida Lime & Avocado Growers*, 373 U.S. at 142-43; *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

coverable under two circumstances, either accompanying a physical injury or where the defendant's conduct constituted a "direct invasion of the plaintiff's rights such as that constituting slander, libel, malicious prosecution, seduction, or other like willful, wanton, or malicious misconduct." *State Farm Mutual Automobile Insurance Company v. Village of Isle*, 265 Minn. 360, 122 N.W.2d 36, 41 (1963).

In 1983, Minnesota joined the majority of jurisdictions that explicitly recognized the tort of intentional infliction of emotional distress. *Hubbard v. United Press International, Inc.*, 330 N.W.2d 428 (Minn. 1983). In *Hubbard*, the Minnesota Supreme Court adopted the definition of intentional infliction of emotional distress set forth in *Restatement (Second) of Torts* § 46(1) (1965). The elements of this state law claim were set forth as follows:

- (1) The conduct must be extreme and outrageous;
- (2) The conduct must be intentional or reckless;
- (3) It must cause emotional distress; and
- (4) The distress must be severe. 330 N.W.2d at 438-39.

Two important points also follow from the Minnesota Supreme Court's adoption of this tort in *Hubbard*. First, the Minnesota Supreme Court narrowly defined the conduct this tort was to make actionable as that "so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community." 330 N.W.2d at 439 (quoting *Haagenenson v. National Farmers Union Property and Casualty Co.*, 277 N.W.2d 648, 652-53 n.3

(Minn. 1979)). Second, the Minnesota Supreme Court was very careful to limit the scope of this cause of action, holding that a “complainant must sustain a . . . heavy burden of production in his allegations regarding the severity of his mental distress,” 330 N.W.2d at 439. Emphasizing *both* of these restrictions, the court reasoned:

In explaining both the extreme nature of the conduct necessary to invoke this tort, and the necessary degree of severity of the consequent mental distress, the Restatement’s commentary emphasizes *the limited scope of this cause of action*, and clearly reflects a strong policy to prevent fictitious and speculative claims. Because this policy has long been a central feature of Minnesota law on the availability of damages for mental distress, our adoption of the Restatement formulation as the standard for the independent tort of intentional infliction of emotional distress does not signal an appreciable expansion in the scope of conduct actionable under this theory of recovery. The operation of this tort is *sharply limited* to cases involving *particularly egregious facts*. (footnote omitted) 330 N.W.2d at 439 (emphasis added).

Consequently, when undertaking our examination of the RLA and the FEOLA, the extremely limited nature and scope of this state law claim is a paramount consideration.

B. The Railway Labor Act

As recognized by the Minnesota Supreme Court, the Burlington Northern’s argument that the RLA implicitly preempts respondent’s state law claim fails because it runs squarely afoul of this Court’s decisions. The Burlington Northern’s claim of implicit preemption, stripped to its essence, is that the employee-employer relationship *mandates* the jurisdiction of the RLA, even if the wrongful

conduct has *nothing* to do with ordinary working conditions or matters covered by the collective bargaining agreement, and in spite of the fact that the RLA provides *no remedy* for any emotional harm. In case after case, this Court has rejected this broad claim of preemption, both under the RLA, *Terminal Railroad Assoc. of St. Louis v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943), and *Brotherhood of Locomotive Engineers v. Baltimore & Ohio R.R. Co.*, 372 U.S. 284 (1963); and under the similar goals, objectives, and principles of the National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.*, *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25*, 430 U.S. 290 (1977).

The RLA is indeed mandatory for "minor disputes,"⁷ and courts have repeatedly held that a railroad employee cannot transform a true minor dispute (such as a wrongful discharge claim) into a state tort action merely by claiming emotional distress from the conduct making up the minor dispute. See *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984) (railway employee's claim of retaliatory discharge preempted by RLA); *Choate v. Louisville & Nashville R.R. Co.*, 715 F.2d 369 (7th Cir. 1983) (railroad employee's claim that the railroad wrongfully discharged him and failed to reinstate him is a minor dispute under the RLA); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir. 1978); *cert. denied*, 439 U.S. 930 (1978) (railroad

⁷ This Court has defined minor disputes under the RLA as "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation, generally involving only one employee." *Brotherhood of Railroad Trainmen v. Chicago River and Indiana R.R. Co.*, 353 U.S. 30, 33 (1957).

employee's claim of wrongful discharge preempted by RLA). See also, *Beers v. Southern Pacific Transportation Co.*, 703 F.2d 425 (9th Cir. 1983) where the claim was not for wrongful discharge, but instead concerned the railroad's particular disciplinary procedures.⁸

These cases, so heavily relied upon by the Burlington Northern for its claim that respondent's intentional infliction of emotional distress claim is preempted by the RLA, in fact stand for nothing more than the common sense proposition that where *the essence* of the wrongful conduct complained of concerns a true minor dispute such as a wrongful discharge, the RLA applies. Respondent's

⁸ The employee in *Beers v. Southern Pacific Transportation Co.* was a union local chairman who was fired on an insubordination charge because he engaged in "heated words" and name-calling with the supervisor at a hearing where he represented another employee. After he was fired, the employee filed a wrongful discharge claim with the National Railroad Adjustment Board (under the RLA) and sued his intentional infliction of emotional distress claim in state court. The state court action was removed to federal district court, where summary judgment was granted to the railroad on the basis that all of the employee's complaints arose out of the collective bargaining agreement, and thus were minor disputes under the RLA. The employee's *only* claims of intentional infliction of emotional distress arose out of the railroad's particular disciplinary procedures regarding two *other* engineers in his union, who the employee represented in his capacity as a union local chairman; and that he "received a run-around" over his complaints regarding working conditions. 703 F.2d at 427-28. The employee's complaints in *Beers* were thus not only nothing more than those ordinarily expected in the workplace, over conditions and particular disciplinary procedures, but more importantly, there was not a single allegation in *Beers* of the type of outrageous conduct alleged here, i.e. that rising to the level of "so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community." *Hubbard v. United Press International, Inc.*, 330 N.W.2d at 439.

allegations here that Burlington Northern officials, among other things, rifled his private locker, forged his time card in an unsuccessful attempt to get him fired, subjected him to harassing surveillance and racial epithets, referred to him as “[t]hat stinking Arab,” and threatened that “[w]e will get that S.O.B.” (App., 31a), obviously have no connection to a wrongful dispute claim, or, for that matter, any other possible subject of a grievance under the collective bargaining agreement. To the contrary, this is wrongful conduct that unquestionably meets the strict *Hubbard* standard as that “so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community.” 330 N.W.2d at 439.

As recognized by the Minnesota Supreme Court (App., 14a-15a), this Court has repeatedly held that the RLA is not all-encompassing of *every* matter concerning working conditions, *See, Terminal Railroad Assoc. of St. Louis v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6-7 (1943) (where this Court held that the RLA did not preclude the State of Illinois from enforcing a state safety requirement that cabooses be attached to all trains operating within the state); and *Brotherhood of Locomotive Engineers v. Baltimore & Ohio R.R. Co.*, 372 U.S. 284, 289-90 (1963) where it was held that the RLA does not regulate “wages, hours, or working conditions;” but only that which forms a true minor dispute, i.e. that stemming “from differing interpretations of the collective-bargaining agreement.” *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 324 (1972).

Thus, the Congressional scheme of the RLA does not implicitly preempt respondent’s state law claim, a claim

which does not arise out of the collective bargaining agreement and which is not a minor dispute. The next step is to determine whether this state law claim *conflicts with* or is an *obstacle to* the accomplishment of the purposes of the RLA.

The fallacy of the railroads claim that the Minnesota Supreme Court's decision "conflicts with the decisions of this Court" (Petition, 10) is most evident when examining this Court's decision in *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25*, 430 U.S. 290 (1977). The plaintiff in *Farmer* was a carpenter and elected union official. Because of a disagreement between he and other union officials over various internal union policies, the union began to discriminate against him in referrals to employers from the hiring hall, and additionally subjected him to a "campaign of personal abuse and harassment." 430 U.S. 292. The plaintiff filed a state court action against his union, alleging both the discrimination in the union's hiring hall practices (which was also a breach of the applicable collective bargaining agreement) and the union's intentional infliction of emotional distress. The trial court sustained a demurrer to both the hiring hall discrimination and breach of contract claims on the basis of federal preemption, and allowed the intentional infliction of emotional distress claim to go to trial. The jury found in favor of the plaintiff, 430 U.S. at 294, but on appeal, the California Court of Appeals reversed. Following the California Supreme Court's denial of review, this Court granted certiorari solely to consider the application of the preemption doctrine to the plaintiff's intentional infliction of emotional distress claim. 430 U.S. at 294-95.

In resolving this question, this Court first recognized the "two competing interests" that shaped the preemption doctrine in labor law. *Id.* at 295. On the one hand, Congress' intent to make federal labor laws uniform implied that potentially conflicting state laws and remedies "cannot be permitted to operate." On the other hand, because Congress refrained from providing "specific directions with respect to the scope of preempted state regulation," the court noted that it had been "unwilling to 'declare preempted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers and unions . . .'" 430 U.S. at 295-96.

The Court further noted that it had previously refused to apply the preemption doctrine to various activities that might otherwise appear to fall within its scope. These prior decisions included activity that "was merely a peripheral concern" of the federal labor law, or "touched interests *so deeply rooted in local feelings and responsibility* that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the states of the power to act." 430 U.S. at 296-97 (emphasis added). Finally, this Court pointed out that it had refused to apply the preemption doctrine "where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes." 430 U.S. at 297.

Essentially, then, the preemption doctrine stated by this Court in *Farmer* requires (as recognized by the Min-

nesota Supreme Court, (App., 16a)) a balancing of the state interest in regulating the conduct in question with the potential for interference with the federal scheme. *Farmer*, 430 U.S. at 300.

Turning to the particular facts of the case before it, this Court in *Farmer* recognized the State of California's "substantial interest in protecting its citizens from the kind of abuse of which [the plaintiff] complained," i.e. "outrageous conduct, threats, intimidation, and words" which caused him to suffer "grievous mental and emotional distress as well as great physical damage." 430 U.S. at 301-302.

Balancing this state interest's potential for interference with federal regulation, the Court found a *complete absence* of any federal labor law protection for the plaintiff from this conduct "so outrageous that 'no reasonable man in a civilized society should be expected to endure it.' " 430 U.S. at 302. While the plaintiff could bring his discrimination or breach of contract claim before the National Labor Relations Board:

Whether the statements or conduct of the respondents also caused [the plaintiff] severe emotional distress and physical injury would play *no role* in the Board's disposition of the case, and *the Board could not award [the plaintiff] damages for pain, suffering, or medical expenses.* 430 U.S. at 304. (emphasis added)

Exactly as in *Farmer*, respondent has no remedy under the RLA for the railroad's intentional infliction of emotional distress. The Railroad Adjustment Board could not award money damages, nor do respondent's allegations have anything to do with interpreting the party's

collective bargaining agreement, the exclusive focus of an adjustment board. The focus of the state court action, on the other hand, is on the elements of the tort under state law, a determination that may be made "without resolution of the 'merits' of the underlying labor dispute," if any. *Farmer*, 430 U.S. at 304.

In an excellent example of a case where the railroad employee's intentional infliction of emotional distress claim was based upon truly outrageous conduct separate and apart from a connection to a wrongful discharge, the California federal court in *Balzeit v. Southern Pacific Transportation Co.*, 569 F.Supp. 986, 989 (N.D. Cal. 1983) recognized that this Court's analysis in *Farmer* squarely applied.

[N]either the RLA nor the collective bargaining agreement involved herein protects against the alleged outrageous conduct involved in Balzeit's Second and Third Causes of Action [based on the condition that he discharge his FELO attorney]. While Southern Pacific directs this court's attention to several provisions of the collective bargaining agreement governing the relationship between it and Balzeit's union . . . *nothing in such Agreement deals directly with, or provides a remedy for, the harm which Balzeit suffered when Southern Pacific allegedly required that he dismiss his attorney as a condition to his reinstatement.* (emphasis added)

The *Balzeit* court recognized that the merits of the employee's claims would only "peripherally concern itself with the merits of the underlying labor dispute," 569 F.Supp. at 989, and because the employee sought *only damages* from the railroad, there was "virtually no chance that [the employee's] state court action would conflict

with the administrative mechanism provided for under the RLA." *Id.* at 989-90.

Seeking the only escape possible from the dictates of this Court in *Farmer*, the Burlington Northern has argued throughout that the National Labor Relations Act in *Farmer* is somehow less comprehensive than the RLA, apparently on the theory that only the RLA statutorily requires that employment disputes be arbitrated. However, when courts such as in *Jackson v. Consolidated Rail Corp.*, *supra*, 717 F.2d at 1052, make this comparison, they are referring only to the original provisions of the NLRA that date back to the Wagner Act and create a regulatory scheme administered by the National Labor Relations Board. The *entire* NLRA includes the amendments of the Taft-Hartley Act of 1947, particularly Sect. 301, 29 U.S.C. § 185, which is just as much a part of the NLRA as those parts enforced by the National Labor Relations Board. In the case of more than 90 percent of collective bargaining agreements, the *contract* establishes a grievance and arbitration remedy that is *exclusive*, exactly as with the arbitration remedy established by the RLA. See, *Allis-Chalmers Corp. v. Lueck*, — U.S. —, 105 S.Ct. 1904, 1915-1916 (1985)⁹.

⁹ The Minnesota Supreme Court, in reaching this conclusion, pointed out Judge Posner's analysis of the issue in *Jackson v. Consolidated Rail Corp.*, 717 F.2d at 1060 (J. Posner, concurring in part and dissenting in part) where Judge Posner wrote "it might be different if Congress had established an administrative agency to police tort or tort-like conduct in railroad employment, but it has not; it has contented itself with requiring arbitration of contract disputes." The Minnesota Supreme Court noted that requiring arbitration of railway contract disputes is not unlike the limited scope of the NLRA's dispute-resolution process. (App., 16a, n.6)

C. The Federal Employers' Liability Act.

In arguing that the Minnesota Supreme Court's decision is "in conflict with decisions of this Court and that of several circuits," on preemption by the FELA (Petition, 16) the Burlington Northern once again is simply wrong. A close examination of petitioner's authorities on this question reveals that it has not cited *a single case* where a railroad employee sought damages for the railroad's intentional infliction of emotional distress. The Burlington Northern's reliance on *New York Central and Hudson R.R. v. Tonsellito*, 244 U.S. 360 (1917) and *Janelle v. Seaboard Coastline R.R.*, 524 F.2d 1259 (5th Cir. 1975), is completely misplaced because each case involved a claim for *personal injuries or death* resulting from a railroad's *negligence*. This Court in *Tonsellito* merely held that the injured 17-year-old railroad employee's *father* lost his common law right to claim his son's medical expenses and the loss of his son's services. In *Janelle*, the decedent railroad employee's spouse, after taking a FELA case to trial in which the jury found no negligence on the railroad, brought a state wrongful death claim for the same accident. In neither case was *intentional* and *outrageous* conduct of the railroad at issue, nor were these courts concerned with a claim for *emotional distress*.

As pointed out by the Minnesota Supreme Court, § 1 of the FELA, 45 U.S.C. § 51 (1982) speaks only to "negligence," and "neither the express language of the FELA nor its interpretation by federal courts covers" an intentional infliction of emotional distress claim for "purely emotional injuries." (App., 20a-21a) The Minnesota Supreme Court also pointed the well-established principle in the various circuits that, as stated by the Seventh

Circuit Court of Appeals: "[T]he FELA does not reach torts which work their harm through *nonphysical* means . . ." *Lancaster v. Norfolk and Western Railway Co.*, 773 F.2d 807, 815 (7th Cir. 1985) (emphasis added) (App., 21a)¹⁰

Rather than conflicting with established law, the Minnesota Supreme Court's opinion is in fact *in full conformity* with a number of federal circuits which have held infliction of emotional distress actions to be *independent* of any claim under the FELA. See, *Lewis v. Louisville & Nashville R.R. Co.*, 758 F.2d 219, 221-22 (7th Cir. 1985), where the court held that the employee's intimidation claim "alleged a different wrong and involved a different set of facts than the FELA claims;" and *Tello v. Soo Line R.R. Co.*, 772 F.2d 458, 461 (8th Cir. 1985), where the court noted that a railroad employee's claim of intentional infliction of emotional distress was a "state law claim."

Using the *Farmer* balancing test, the Minnesota Supreme Court recognized here that respondent's state law action may present "some" potential for interference, but that this interference was minimized by the sharp limitations and high thresholds of the state law claim. (App., 24a) Balanced against this potential for interference was Minnesota's "substantial interest in protecting its citizens from the type of harm that constitutes the intentional infliction of emotional distress," (App., 25a). Balancing the

¹⁰ See also, e.g. *Bullard v. Central Vermont Railway, Inc.*, 565 F.2d 193 (1st Cir. 1977); *McSorley v. Consolidated Rail Corp.*, 581 F.Supp. 642 (S.D.N.Y. 1984); *Cales v. Chesapeake & Ohio Railway Co.*, 300 F.Supp. 155 (W.D. Va. 1969); Annot., 8 A.L.R. 3d 442 (1966 & Supp. 1985).

State of Minnesota's substantial interest against this minimal potential for interference, the Minnesota Supreme Court properly held that the FELA does not preempt respondent's state law claim. (*Id.*)

D. Effect of This Court's Consideration of The Atchison, T. and S.F. Ry. v. Buell, No. 85-1140.

The Burlington Northern has asked this Court to "hold this case pending a decision in *Buell* or review this case as well." (Petition, 11) An examination of the issues under review by this Court in *Buell*, as well as the Minnesota Supreme Court's *explicit nonreliance* on the decision of the Ninth Circuit Court of Appeals in *Buell*, reveals that neither action is warranted. The Ninth Circuit's opinion in *Buell v. Atchison, T. S.F. Ry. Co.*, 771 F.2d 1320 (9th Cir. 1985), *cert. granted*, 106 S.Ct. 1946 (1986), dealt solely with a relationship between two federal statutes, the FELA and the RLA. There was no state law claim of any kind in *Buell*, much less one of the extremely limited nature at issue here. Most important, the Ninth Circuit's holding in *Buell* clearly stated its limitation to cases traditionally subject to the FELA, i.e. those resulting from a railroad's *negligence*. As held by the Seventh Circuit:

We hold that where an employee has suffered an injury *attributable to employer negligence*, the injury is compensable under the FELA regardless of its characterization as mental or physical. 771 F.2d at 1324! (emphasis added)

Consequently, while this Court's ruling in *Buell* will clarify the extent to which railroad employees may claim emotional damages resulting from a railroad's negligence, it will have no bearing on the issues presented here.

Equally important, this Court's decision in *Buell* will have no bearing on the Minnesota Supreme Court's rationale or basis for its conclusion, as the Minnesota court explicitly disclaimed any reliance on *Buell*. In fact, the Minnesota Supreme Court expressly noted that the Ninth Circuit's holding in *Buell* was "very much in the minority" and that *Buell* dealt only with "*negligent* acts on the part of co-employees." (App., 21a, n.7)



CONCLUSION

The Petition for a Writ of Certiorari to review the judgment of the Minnesota Supreme Court should be denied, and petitioner's request that the Court hold this case pending its decision in *Buell* should similarly be denied.

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